Mr. Burkard

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Grimes Oil Company Inc., General Oil Company, Phoenix Petroleum Co., and Las Energy Corporation

File: B-239334; B-239764

Date: August 17, 1990

Raymond S. Wittig, Esq., for the protesters.
Richard D. Saviet, Esq., Defense Fuel Supply Center, Defense Logistics Agency, for the agency.
Richard P. Burkard, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency issues proposed regulation which establishes eligibility of small disadvantaged business (SDB) dealers for obtaining SDB evaluation preference, issuance of final rule, based on comments received, which further restricts eligibility requirements, without request for further public comment, is not improper.

DECISION

Grimes Oil Company Inc., General Oil Company, Phoenix Petroleum Co., and Las Energy Corporation, all small disadvantaged business (SDB) dealers, protest the terms of invitation for bid (IFB) No. DLA600-90-B-0003, issued by the Defense Fuel Supply Center for petroleum requirements for military activities and civilian agencies. The protesters allege that the IFB improperly contained a clause which failed to grant them an SDB evaluation preference which would have rendered their bids low for various line items under the IFB. The protesters request that we find the IFB clause invalid since they allege that the regulation upon which it is based was issued in a manner contrary to public notice requirements. Las Energy Corporation and Phoenix Petroleum Company also protest the terms of IFB No. DLA600-90-B-0002 on the same grounds.

We deny the protests.

The IFBs in question were issued on an unrestricted basis and contained the Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) clause, "Notice of Evaluation Preference for Small Disadvantaged Business (SDB) Concerns (Unrestricted) (Alternate I) (DAC 88-11)," as was found in DFARS § 252.219-7007 (Alternate I) (DAC 88-11). This provision stated that an SDB regular dealer submitting an offer in its own name had to furnish, in performing the contract, only end items manufactured or produced by small business concerns in order to get the preference.1/ When DOD published the proposed regulations that ultimately resulted in this provision, the proposed rule restricted SDB dealer eligibility to receive an evaluation preference to those that would provide the product of an SDB manufacturer; if there were no SDB manufacturers available, the SDB dealer could provide the product of a small or large business and still receive an evaluation preference. The final rule, however, provided that where there are no SDB manufacturers available, an SDB dealer must provide the product of a small business in order to receive the preference. Here, the protesters, regular dealers, offered the products of large business concerns, and therefore did not receive a preference.

The protesters argue that the DFARS provision was not issued in accordance with procedural requirements provided for by statute and regulation. The protesters argue that publication of the final rule in the Federal Register for another round of comments was required by law and regulation, since the final rule significantly altered the proposed rule. The protesters reference 41 U.S.C. § 418(b) (1988) and Federal Acquisition Regulation (FAR) § 1.501-2 as requiring notice and a comment period before implementation of the change.

1/ While the Alternate I clause included in the solicitation requires SDB regular dealers to furnish small business products, the basic clause (DFARS § 252.219-7007 (DAC 88-11)) requires SDB regular dealers to furnish end items manufactured by SDB concerns. The Alternate I clause is used when a determination is made that there are no SDB manufacturers available which can meet the requirements. DFARS § 219.7002 (DAC 88-13). We have previously concluded that the DFARS provision in question is a reasonable implementation of DOD's broad statutory mandate to promote SDB awards. Baszile Metals Serv., B-237925; B-238769, Apr. 10, 1990, 90-1 CPD ¶ 378.

The statute cited by the protesters, 41 U.S.C. § 418(b), provides that:

> "no procurement . . . regulation . . . relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement . . . regulation . . . or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 30 days after the procurement . . . regulation . . . is published for public comment in the Federal Register pursuant to subsection (b) of this section."

41 U.S.C. § 418b(a). Subsection (b) states that the head of an agency shall cause to be published in "the Federal Register a notice of the proposed . . . regulation . . . and provide for a public comment period for receiving and considering the views of all interested parties on such proposal." 41 U.S.C. § 418b(b). By its terms, the statute requires publication of proposed regulations which will have a significant effect on the procurement system. The FAR language implements this law and essentially provides that proposed significant revisions to the FAR system are to be published in the Federal Register with a minimum of 30 days for receipt of comments.2/ FAR § 1.501-2. Under the FAR and 41 U.S.C. § 418b, any change which alters the substantive meaning of any coverage in the FAR system or has a significant cost or administrative impact on contractors is considered significant.

The statute and regulation require that agencies publish proposed regulations and allow the public to participate in the formulation of a regulation by providing a public comment period. The statute, which is entitled, "Publication of Proposed Regulations," specifically states that the publication requirement will be satisfied by publication of a proposed regulation. The statute does not address the situation where a proposed rule is published in the Federal Register, comments are received, and based on those comments, the final rule adopted differs from the proposed rule.

2/ The FAR system consists of the FAR, which is the primary document, and agency acquisition regulations that implement or supplement the FAR. FAR § 1.101 (FAC 84-18). The DFARS, therefore, is part of the FAR system.

We think that an agency has authority to promulgate a final rule that differs in some particulars from its proposed rule. We recognize, as courts have in the analogous area of rulemaking under the Administrative Procedure Act, that practical reality dictates that an agency may make changes without embarking on a new round of commentary. See Action Alliance of Sr. Citizens of Phil. v. Bowen, 846 F.2d 1449 (D.C. Cir. 1988). We further agree with the courts that where the final rule issued by an agency differs from a proposed rule, the appropriate inquiry is whether the notice provided in connection with the proposed rule is sufficient to support the final rule promulgated by the agency. See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983). Thus, the issue presented by this protest is the adequacy of the notice of the proposed rule.

The purpose of the notice and comment requirement is both to allow the agency to benefit from the experience and input of the parties who file comments and to see to it that the agency maintains a flexible and open-minded attitude towards it own rule. The notice and comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decision-making. See Chocolate Mfrs. Ass'n of United States v. Block, 755 F.2d 1028 (4th Cir. 1985). The notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking. Id.

The notice of the proposed rule advised the public that the purpose of the regulation was to establish when an SDB dealer would be eligible to receive an evaluation preference. 53 Fed. Reg. 49,577 (1988). The notice stated that previously an SDB dealer could obtain the preference by providing the product of any business concern, including large businesses. The proposed regulation restricted the preference to SDB dealers providing the product of an SDB manufacturer, if available. If SDB products were not available, the proposed regulation permitted SDB regular dealers to furnish large business products. The proposed regulation therefore, at a minimum, placed the protesters on notice that the DOD was proposing to significantly restrict the eligibility of an SDB dealer for the evaluation preference.

An agency, in its notice of proposed rulemaking, need not identify precisely every potential regulatory change. See Chocolate Mfrs. Ass'n of United States v. Block, 755 F.2d at 1104. Given that the purpose of the notice is to solicit comments on what is proposed, we think that when eligibility

requirements are the subject of the proposed rulemaking, the agency reasonably may be expected to adopt as a final rule requirements that are more or less restrictive than the rule proposed initially, based on the comments received and the agency's evaluation of the comments. This is what occurred here. The record shows that the agency received many comments objecting to SDB dealers receiving an evaluation preference where they supply the product of a large business. The firms offering those comments believed that granting an SDB evaluation preference to SDB dealers would be unfair to small business manufacturers. The agency, after considering the comments received, adopted a final rule that in one respect--eligibility of a dealer for an SDB preference where an SDB manufacturer or producer is not available--is more restrictive than that originally proposed. This more restrictive rule, however, clearly is within the scope of the proposed rule and resulted from the comments received on this aspect of the proposed rule. In short, we think the notice of the proposed rule clearly is sufficient to support the rule finally adopted.

The protests are denied.

for Ronald Berg

James F. Hinchman
General Counsel